KWAN NGEN WAH & ORS v. HIEW KON FAH & ORS AND OTHER APPEALS

COURT OF APPEAL, KOTA KINABALU
TENGKU MAIMUN TUAN MAT JCA
MARY LIM JCA
YAACOB MD SAM JCA
[CIVIL APPEALS NO: S-01-742-12-2011,
S-02-3134-12-2011 & S-02(IM)-3135-12-2011]
22 MARCH 2019

LAND LAW: *Title – Fraud – Land title held by 46 natives – Natives granted power of attorney to first individual who entered into sale and purchase agreement with purchasers for sale of land – Land titles issued to first individual but collected by second individual – Director of Lands and Surveys Department gave permission to natives to transfer lands to second individual – Second individual entered into sale and purchase agreement with third individual – Third individual entered into sale and purchase agreement with fourth individual who sold lands to company – Whether third individual registered owner of lands – Whether sale of lands from third individual to fourth individual valid – Whether endorsements of transfer valid – Whether tainted with forgeries or fraud – Whether there was conspiracy and collusion to defraud purchasers*

The dispute in the present appeals concerned an oil palm plantation ('the lands') which were originally the subject of land applications in 1984 by 46 natives led by one Hadji Nur Sakandal ('Sakandal'). In 1988, the land applications were approved for logging. Sakandal, who had a power of attorney ('POA') granted by the natives, entered into a sale and purchase agreement ('SPA') with Kwan Ngen Wah and Kwan Ngen Chung ('Kwan brothers') in 1992 ('the 1992 SPA'). By a substituted POA, Sakandal granted a POA to the Kwan brothers who, through their company, Kwantas Development Sdn Bhd ('Kwantas'), entered and cultivated the lands. In 1999, land titles were issued to Sakandal and the 45 natives and these titles were collected by one Abdul Hamid Dullih ('Hamid'), on the basis of a POA granted by the natives. The Director of Land and Survey Department gave permission to the natives to transfer the lands to Hamid. The Kwan brothers wrote to the Assistant Collector of Land Revenue ('ACLR'), requesting the Land Office not to register the transfer of the lands to Hamid pending the resolution of their rights over the lands. However, in 2001, the transfer from the natives to Hamid was registered. Hamid later transferred the lands to one Julita who then entered into an SPA with one Hiew Kon Fah ('Hiew') to sell the lands ('the 2005 SPA'). Julita also executed a valid and registrable

memoranda of transfer ('MOT') and all other documents to transfer the lands to Hiew. In 2005, Hiew subleased the lands to Gabungan Saga Sdn Bhd ('Gabungan') for a period of 90 years. Hiew and Gabungan executed an MOT in favour of Bumiputra-Commerce Bank Bhd ('the bank') for a loan facility of RM48 million. The loan, which was to finance the purchase price to Julita, was released in October 2005. Hiew and Gabungan filed a suit at the High Court, against the Kwan brothers and Kwantas, for an order of possession of the lands, damages and an account of all the proceeds of the oil palm fruits harvested by the Kwan brothers from 14 February 2005 ('the original action'). Resisting the original action, the Kwan brothers argued that (i) Julita was never the registered owner of the lands and Hiew could not have purchased the lands from her; and (ii) the endorsements of the transfer and/or the sublease was null and void or, in the alternative, such endorsements were forgeries or tainted with fraud. The Kwan brothers counterclaimed against Hiew, Gabungan, the bank, Vun Yun Lau ('Vun'), Julita, the ACLR of Kinabatangan, the Registrar of Native Titles, Kinabatangan and the State Government of Sabah ('the defendants in the counterclaim') on grounds of fraudulent transfer of the lands to Hiew ('the counterclaim'). The High Court dismissed the original action and allowed the counterclaim in part. Hence, the present appeals by (i) the Kwan brothers against the part of the decision of the Judicial Commissioner ('JC') in dismissing their counterclaim against the bank and the State Government of Sabah ('Appeal No. 742'); (ii) Hiew, Gabungan, Vun and Julita against the decision of the JC in dismissing the original action of Hiew and Gabungan and in allowing the counterclaim ('Appeal No. 3134'); and (iii) Hiew and Gabungan against the order of the JC in allowing the Kwan brothers' and Kwantas' application for, *inter alia*, an accounts of the proceeds of harvesting the oil palm fruits on the lands. The issues that arose for adjudication were (i) whether the counterclaim was barred by limitation; (ii) whether the Kwan brothers proved their case of conspiracy, collusion, fraud or forgery; and (iii) whether Julita's counterclaim ought to be allowed.

Held (allowing Appeal No. 742; dismissing Appeal Nos. 3134 and 3135) Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) No consideration had passed from Hamid to the natives, neither was there any from Julita to Hamid or Hiew to Julita. The transfer of valuable lands to the buyer, without payment of the purchase price at the insistence of the purported seller could not be anything but a sham. Hiew had not proved his case that he was a *bona fide* purchaser of the lands for value. It followed that Hiew and Gabungan had no rights over the lands. The JC was correct to dismiss both Hiew and Gabungan's claim against the Kwan brothers and Kwantas. (para 64)

(2) The Kwan brothers had the *locus* to sue under the 1992 SPA. There was a valid sale and purchase of the beneficial interest in the lands by the natives to the Kwan brothers and, given the express provision in the 1992 SPA that the transfer to the Kwan brothers was conditional upon the approval of the Director of Lands and Survey, the 1992 SPA was not void for illegality under s. 24 of the Contracts Act 1950. Neither did the 1992 SPA offend s. 88 of the Sabah Land Ordinance ('Land Ordinance'). The issue of *nemo dat quod non habet* was answered by considering the totality of the terms and conditions of the 1992 SPA. Rule 2(4) of the Land Rules applied to the land office and the land applicants and it could not be the basis to find that the 1992 SPA is illegal or bad in law. (para 77)

(3) The Kwan brothers' cause of action in the counterclaim was to impugn the ownership of Hiew and the sublease to Gabungan which interests were only acquired by Hiew and Gabungan in 2005. The earliest time that the Kwan brothers had knowledge of Hiew's claim that he was the legal owner of the lands was in March 2005. The counterclaim filed on 14 February 2006 was thus well within time. The JC did not err in holding that the counterclaim of the Kwan brothers was not barred by limitation. The same reasoning applied to the other defendants in the counterclaim in that no cause of action would have arisen against any of them until the final act of registering the title to the lands in Hiew/Gabungan. Until then, the cause of action was neither complete nor actionable. (para 88)

(4) There were merits in the Kwan brothers' grievance and much force in their submission that the registration of the charge without the written permission of the Director of Lands and Surveys was bad and that there was no provision in the Land Ordinance for the retrospective application to cure a defect except by a fresh memorial. Even if the submission of Kwan brothers' could not be sustained, the belated written permission in itself, coupled with the other facts and surrounding circumstances, was indicative of something terribly amiss in the transaction. Furthermore, the solicitor, as the agent of the bank, had notice of the Kwan brothers' interest and/or that possible fraud or suspicion had been aroused and yet he failed to make further enquiries. On this ground, with the solicitor's knowledge imputed to the bank, the bank could not be said to be a *bona fide* chargee and the registration of the charge would be defeasible unless the solicitor himself is complicit in the fraud. (paras 98 & 103)

(5) There was sufficient evidence to show that Vun, Julita, Hiew and Gabungan had acted dishonestly, such as to deprive the Kwan brothers of the lands. Having regard to the sequence of events and the irregularities in the transaction and the whole circumstances of the case, the Kwan brothers had, on the balance of probabilities, established their pleaded case against the defendants in the counterclaim. (para 113)

(6) Although no reason was given by the JC on why Julita's counterclaim was dismissed, there was no reason to depart from the said decision. Julita was privy to the sham transaction and, undoubtedly, the lands were cultivated by the Kwan brothers. Julita would be unjustly enriched if her claim for profits from the lands, which were not developed through her efforts, was allowed. (para 114)

Bahasa Malaysia *Headnotes*

Pertikaian dalam rayuan-rayuan ini adalah berkaitan ladang kelapa sawit yang, asalnya, membentuk hal perkara permohonan-permohonan tanah pada 1984, oleh 46 anak negeri, dipimpin oleh seorang bernama Hadji Nur Sakandal ('Sakandal'). Pada 1988, permohonan-permohonan tanah ini diluluskan untuk pembalakan. Sakandal, yang mempunyai surat kuasa wakil ('SKW') daripada anak-anak negeri, memeterai satu perjanjian jual beli ('PJB') dengan Kwan Ngen Wah dan Kwan Ngen Chung ('Kwan bersaudara') pada 1992 ('PJB 1992'). Melalui satu SKW gantian, Sakandal memberi SKW kepada Kwan bersaudara yang, melalui syarikat mereka, Kwantas Development Sdn Bhd ('Kwantas'), memeterai dan mengusahakan tanah-tanah tersebut. Pada 1999, hak milik tanah dikeluarkan kepada Sakandal dan 45 anak negeri dan hak-hak milik ini diambil oleh seorang bernama Abdul Hamid Dullih ('Hamid'), atas dasar SKW yang diberi oleh anak-anak negeri. Pengarah Jabatan Tanah dan Survei memberi kebenaran kepada anak-anak negeri memindah milik tanah-tanah tersebut kepada Hamid. Kwan bersaudara menulis kepada Timbalan Pemungut Hasil Tanah ('TPHT'), memohon agar pejabat tanah tidak mendaftarkan pindah milik tanah-tanah kepada Hamid sementara menanti penyelesaian hak mereka atas tanah. Walau bagaimanapun, pada 2001, pindah milik daripada anak-anak negeri kepada Hamid didaftarkan. Hamid seterusnya memindah milik tanah-tanah tersebut kepada seorang bernama Julita yang kemudian memeterai satu PJB dengan seorang bernama Hiew Kon Fah ('Hiew') untuk menjual tanah-tanah tersebut ('PJB 2005'). Julita memeterai satu memoranda pindah milik ('MPM') yang sah dan boleh daftar dan semua dokumen-dokumen lain untuk memindah milik tanah-tanah tersebut kepada Hiew. Pada 2005, Hiew membuat pajakan kecil atas tanah-tanah tersebut pada Gabungan Saga Sdn Bhd ('Gabungan') untuk tempoh 90 tahun. Hiew dan Gabungan memeterai

satu MPM untuk Bumiputra-Commerce Bank Bhd ('bank') untuk kemudahan pinjaman berjumlah RM48 juta. Pinjaman tersebut, untuk membiayai harga belian kepada Julita, dilepaskan pada Oktober 2005. Hiew dan Gabungan memfailkan satu guaman di Mahkamah Tinggi, terhadap Kwan bersaudara dan Kwantas, untuk satu perintah milikan tanah, ganti rugi dan satu akaun untuk hasil buah kelapa sawit yang dituai oleh Kwan bersaudara dari 14 Februari 2005 ('tindakan asal'). Membantah tindakan asal, Kwan bersaudara menghujahkan (i) Julita tidak pernah menjadi pemilik berdaftar tanah-tanah dan Hiew tidak membeli tanah-tanah tersebut daripadanya; dan (ii) pengendorsan pindah milik dan/atau pajakan kecil tidak sah dan terbatal, atau alternatifnya, pengendorsan sedemikian palsu dan/atau tercemar dengan penipuan. Kwan bersaudara menuntut balas terhadap Hiew, Gabungan, bank, Vun Yun Lau ('Vun'), Julita, TPHT Kinabatangan, Pendaftar Hak Milik Anak Negeri, Kinabatangan dan Kerajaan Negeri Sabah ('defendan-defendan dalam tuntutan balas') atas alasan penipuan pindah milik tanah-tanah kepada Hiew ('tuntutan balas'). Mahkamah Tinggi menolak tindakan asal dan membenarkan sebahagian tuntutan balas. Maka timbul rayuan-rayuan ini oleh (i) Kwan bersaudara terhadap bahagian keputusan Pesuruhjaya Kehakiman ('PK') menolak tuntutan balas mereka terhadap bank dan Kerajaan Negeri Sabah ('Rayuan No. 742'); (ii) Hiew, Gabungan, Vun dan Julita terhadap keputusan PK dalam menolak tindakan asal Hiew dan Gabungan dan membenarkan tuntutan balas ('Rayuan No 3134'); dan (iii) Hiew dan Gabungan terhadap perintah PK membenarkan permohonan Kwan bersaudara dan Kwantas untuk, antara lain, satu akaun hasil tuaian buah kelapa sawit di atas tanah-tanah tersebut. Isu-isu yang timbul untuk diputuskan ialah (i) sama ada tuntutan balas terhalang oleh had masa; (ii) sama ada Kwan bersaudara membuktikan kes mereka tentang konspirasi, pakatan, penipuan atau pemalsuan; dan (iii) sama ada tuntutan balas Julita wajar dibenarkan.

Diputuskan (membenarkan Rayuan No. 742; menolak Rayuan No. 3134 dan 3135)

Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Tiada balasan yang diberi oleh Hamid kepada anak-anak negeri, mahu pun oleh Julita kepada Hamid atau Hiew kepada Julita. Pindah milik tanah-tanah bernilai kepada pembeli, tanpa bayaran harga belian atas gesaan penjual yang didakwa, tidak lain tetapi satu penipuan. Hiew gagal membuktikan kesnya bahawa dia pembeli suci hati tanah-tanah untuk satu balasan. Diikuti bahawa Hiew dan Gabungan tiada hak atas tanah-tanah tersebut. Pesuruhjaya Kehakiman bertindak betul dalam menolak tuntutan Hiew dan Gabungan terhadap Kwan bersaudara dan Kwantas.

(2) Kwan bersaudara mempunyai *locus* untuk menyaman bawah PJB 1992. Terdapat jualan dan belian sah kepentingan benefisial dalam tanah-tanah tersebut oleh anak-anak negeri kepada Kwan bersaudara dan, berdasarkan peruntukan nyata PJB 1992 bahawa pindah milik kepada Kwan bersaudara bergantung pada kelulusan Pengarah Tanah dan Survei, PJB 1992 bukan tidak sah akibat ketaksahan bawah s. 24 Akta Kontrak 1950. PJB 1992 juga tidak melanggar s. 88 Ordinan Tanah Sabah ('Ordinan Tanah'). Isu *nemo dat quod non habet* dijawab dengan mempertimbangkan keseluruhan terma dan syarat PJB 1992. Peraturan 2(4) Peraturan Tanah terpakai pada pejabat tanah dan pemohon-pemohon tanah dan tidak boleh menjadi asas mendapati PJB 1992 tidak sah.

(3) Kausa tindakan Kwan bersaudara dalam tuntutan balas ialah untuk mempersoalkan milikan Hiew dan pajakan kecil Gabungan yang kepentingannya hanya diambil oleh Hiew dan Gabungan pada 2005. Waktu terawal Kwan bersaudara tahu tentang tuntutan Hiew bahawa dia ialah pemilik sah tanah-tanah ialah pada Mac 2005. Oleh itu, tuntutan balas yang difailkan pada 14 Februari 2006 masih dalam had masa. PK tidak terkhilaf dalam memutuskan tuntutan balas Kwan bersaudara tidak terhalang oleh had masa. Alasan sama terpakai pada defendan-defendan lain dalam tuntutan balas mereka iaitu kausa tindakan tidak akan terakru terhadap mana-mana mereka hinggalah tindakan akhir mendaftar hak milik tanah-tanah dalam Hiew/Gabungan. Sehingga itu, kausa tindakan tidak sempurna mahupun boleh didakwa.

(4) Terdapat merit dalam aduan Kwan bersaudara dan keutuhan dalam hujahan mereka bahawa pendaftaran pajakan tanpa kebenaran bertulis Pengarah Tanah dan Survei tidak sah dan tiada peruntukan dalam Ordinan Tanah untuk permohonan retrospektif demi meremedi kecacatan kecuali rekod baharu. Jika pun hujahan Kwan bersaudara tidak boleh kekal, kebenaran bertulis yang terlewat, dengan sendirinya, serta fakta-fakta dan hal-hal keadaan kes, menunjukkan terdapat sesuatu yang sangat salah dalam transaksi tersebut. Tambahan lagi, peguam cara, sebagai ejen bank, menerima notis tentang kepentingan Kwan bersaudara dan/atau kemungkinan penipuan atau syak berbangkit dan dia gagal membuat pertanyaan lanjut. Atas alasan ini, berdasarkan pengaitan pengetahuan peguam cara dengan bank, bank tidak boleh dikatakan pemegang gadaian suci hati dan pendaftaran pajakan boleh disangkal kecuali jika peguam cara itu sendiri terlibat dalam penipuan tersebut.

(5) Terdapat cukup keterangan yang menunjukkan Vun, Julita, Hiew dan Gabungan bertindak tidak jujur, hingga menafikan Kwan bersaudara akan tanah-tanah tersebut. Mempertimbangkan urutan peristiwa-peristiwa yang berlaku dan ketakaturan transaksi dan semua hal keadaan

kes, Kwan bersaudara telah, atas imbangan kebarangkalian, membuktikan kes yang mereka plidkan terhadap defendan-defendan dalam tuntutan balas.

(6) Walaupun tiada alasan diberi oleh PK tentang mengapa tuntutan balas Julita ditolak, tiada alasan untuk menyimpang daripada keputusan tersebut. Julita ialah pihak dalam transaksi penipuan tersebut dan, tidak diragui, tanah-tanah tersebut diusahakan oleh Kwan bersaudara. Julita akan dikayakan secara tidak adil jika tuntutannya terhadap keuntungan daripada tanah-tanah, yang tidak diusahakan dengan usahanya, dibenarkan.

Case(s) referred to:

Accruvest Hotel Management v. Pengurusan Kolej Legenda Sdn Bhd & Anor [2010] 1 LNS 278 HC ***(refd)***

Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal [2016] 3 CLJ 676 CA ***(refd)***

Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1983] 1 LNS 21 FC ***(refd)***

Dadourian Group International Inc v. Simms and Others [2009] 1 Lloyds Rep 601 ***(refd)***

Hon Chung Lip v. Kwan Ngen Wah & Ors [2012] 1 LNS 255 CA ***(refd)***

Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***

Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors [1988] LNS 44 SC ***(refd)***

Malayan Banking Bhd v. Neway Development Sdn Bhd & Ors [2017] 9 CLJ 401 FC ***(refd)***

Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***

MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun & Other Appeals [1995] 2 CLJ 912 CA ***(refd)***

Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***

P.J.T.V. Denson (M) Sdn Bhd & Anor v. Roxy (Malaysia) Sdn Bhd [1980] 1 LNS 55 FC ***(refd)***

Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***

Suratmin Othman v. Yusof Omar & Ors [1998] 2 CLJ Supp 380 HC ***(refd)***

T Sivam Tharamalingam v. Public Bank [2018] MYFC 11 ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

United Malayan Banking Corp Bhd v. Syarikat Perumahan Luas Sdn Bhd [1988] 1 CLJ 577; [1988] 2 CLJ (Rep) 522 HC ***(refd)***

Zainal Abidin Mohamed v. Roslan Abdul Aziz & Anor [2003] 7 CLJ 132 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 24

Interpretation (Definition of Native) Ordinance (Sabah) (Cap 64), ss. 2, 3

Land Ordinance (Sabah) (Cap 68), ss. 41(1)(a), (2), 64(1), 88, 118

Land Rules GN 505/1930, r. 2(3), (4)

Limitation Ordinance (Sabah) (Cap 72), s. 18, Schedule item 77

Rules of the High Court 1980, O. 18 r. 19

(Civil Appeal No: S-01-742-12-2011)

For the appellants - Cyrus Das, Baldev Singh & Kelvin Wong Kah Shing; M/s Baldev Gan & Assocs

For the 1st and 2nd respondents - Saseedharan Menon & Edwin Tsen; M/s Tan Pang Tsen & Co

For the 3rd respondent - Clement Chaim; M/s Fernandez & Co

For the 4th & 5th respondents - Firoz Hussein, Hj Ansari Abdullah & Mohd Amirul Amin; M/s Ansari & Co

For the 6th, 7th & 8th respondents - Zaleha Rose Pandin, Dayangku Fazidah Hatun Pg. Bagul; AG's Sabah

(Civil Appeals No: S-02-3134-12-2011)

For the appellants - Saseedharan Menon & Edwin Tsen; M/s Tan Pang Tsen & Co - Firoz Hussein, Hj Ansari Abdullah & Mohd Amirul Amin; M/s Ansari & Co

For the respondents - Cyrus Das, Baldev Singh & Kelvin Wong Kah Shing; M/s Baldev Gan & Assocs

(Civil Appeal No: 02(IM)-3135-12-2011)

For the appellants - Saseedharan Menon & Edwin Tsen; M/s Tan Pang Tsen & Co

For the respondents - Cyrus Das, Baldev Singh & Kelvin Wong Kah Shing; M/s Baldev Gan & Assocs

[Editor's note: For the High Court judgment, please see Hiew Kon Fah & Anor v. Kwan Ngen Wah & Ors [2010] 1 LNS 1817 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Tengku Maimun Tuan Mat JCA:

Introduction

[1] There are three related appeals before us which arose from the judgment of the High Court of Sabah and Sarawak at Sandakan after a re-trial. The dispute between the parties concerned an oil palm plantation of approximately 617 acres under 46 native titles ("the lands").

[2] The background facts/chronological events giving rise to the dispute are as follows:

(i) The lands were originally the subject of land applications in 1984 by 46 natives ("the natives") led by one Hadji Nur Sakandal ("Nur Sakandal");

(ii) On 3 December 1988, the land applications were approved for logging;

(iii) By a power of attorney ("the PA") registered with the Magistrate Court in Sandakan on 10 November 1992 ("PA 825/92"), the natives granted a PA to Nur Sakandal;

(iv) On 19 November 1992, on the basis of the PA granted by the natives, Nur Sakandal entered into a sale and purchase agreement with Kwan brothers ("the 1992 SPA");

(v) By a substituted PA dated 20 November 1992 and registered in the Magistrate Court in Sandakan ("SUPA 855/92"), Nur Sakandal granted a PA to Kwan Ngen Wah and Kwan Ngen Chung ("Kwan brothers");

(vi) After the 1992 SPA, Kwan brothers through their company, Kwantas Development Sdn Bhd ("Kwantas") entered and cultivated the lands into an oil palm plantation;

(vii) Kwan brothers paid the natives the purchase price, leaving a balance of RM9,038 which was to be paid after the titles to the lands were issued;

(viii) On 28 December 1999, land titles were issued to Nur Sakandal and the 45 natives;

(ix) The titles were collected by Abdul Hamid bin Dullih ("Hamid Dullih"), also on the basis of a PA granted to him by the natives;

(x) On 29 December 1999, the Director of Lands and Surveys Department gave permission to the natives to transfer the lands to Hamid Dullih;

(xi) On 4 January 2000, the solicitors for Kwan brothers wrote to Assistant Collector of Land Revenue ("ACLR") requesting the Kinabatangan Land Office not to register the transfer of the lands to Hamid Dullih pending the resolution of their rights over the lands;

(xii) In March 2000, Kwan brothers entered caveats on the lands;

(xiii) Upon an application by Hamid Dullih to remove the caveats, a land enquiry was held on 29 January 2001 by the ACLR of Kinabatangan by the name of Iman Ali;

(xiv) Iman Ali contended that he delivered his oral decision at the land enquiry held on 29 January 2001 for the caveats to be removed;

(xv) Kwan brothers contended that no decision was delivered on 29 January 2001;

(xvi) On 2 February 2001, the caveats were removed by the ACLR. Section 41(1)(a) of the Sabah Land Ordinance (Cap 68) ("the Land Ordinance") provides that an appeal shall lie from the decision of the ACLR to the Director of Lands and Surveys within 30 days;

(xvii) On 5 February 2001, the transfer from the natives to Hamid Dullih was registered;

(xviii) On 5 February 2001, the transfer from Hamid Dullih to Julita binti Tinggal ("Julita") was registered;

(xix) On 23 November 2004, Hiew Kon Fah ("Hiew") paid RM500,000 to Julita as deposit for the purchase of the lands;

(xx) On 14 February 2005, Julita entered into a sale and purchase agreement with Hiew to sell the lands at a price of RM6.172 million ("the 2005 SPA");

(xxi) By cl. 1(b) of the 2005 SPA, the balance purchase price was to be paid by on or before 30 June 2005 and by cl. 2, if the balance purchase price was not paid within the said period, the agreement shall be forthwith terminated and the deposit forfeited;

(xxii) On 16 February 2005, the Lands and Surveys Department gave permission for the transfer to Julita and to Hiew;

(xxiii) On 1 March 2005, through his solicitors Messrs Tan Pang Tsen & Co, Hiew wrote to Pintasan Estate notifying that he had bought the lands. By Hiew's pleaded case, he knew prior to the 2005 SPA that Kwantas was occupying and cultivating the lands;

(xxiv) On 2 March 2005, Julita executed a valid and registrable memoranda of transfer and all other documents to transfer the lands to Hiew. The transfers were effected between 28 March 2005 until 8 September 2005;

(xxv) In March/April 2005, Hiew subleased the lands to his company Gabungan Saga Sdn Bhd ("Gabungan") for a period of 90 years for a consideration of RM1;

(xxvi) On 2 September 2005, Hiew and Gabungan executed a memorandum of charge in favour of Bumiputra-Commerce Bank Bhd ("the bank") for a loan facility of RM48 million. At this point, no permission was obtained from the Director of Lands and Surveys for the charge;

(xxvii) The loan, which was to finance the purchase price to Julita was released in October 2005; and

(xxviii) Permission for the charge was given by the Director of Lands and Surveys in February 2006.

Proceedings In The High Court

[3] On the basis that they are the registered owner and sublessee respectively, and that Kwan brothers are trespassers on the said lands, Hiew and Gabungan filed a suit against Kwan brothers and Kwantas for an order of possession of the lands, damages and an account of all the proceeds of the oil palm fruits harvested by Kwan brothers from 14 February 2005.

[4] Kwan brothers deny Hiew's and Gabungan's claim. Kwan brothers essentially pleaded that Julita was never the registered owner of the lands and Hiew could not therefore have purchased the lands from Julita; that the purported endorsements of the transfers and/or the sublease was null and void or in the alternative, such endorsements are forgeries or tainted with fraud.

[5] By an amended counterclaim, Kwan brothers commenced action against Hiew, Gabungan, the bank, Vun Yun Lau ("Tony Vun"), Julita, the ACLR of Kinabatangan, the Registrar of the Native Titles, Kinabatangan and the State Government of Sabah (collectively referred to as "the defendants in the counterclaim"). Kwan brothers contended that the defendants in the counterclaim had committed fraudulent acts to have the lands transferred to Hiew.

[6] In particular, Kwan brothers contended that:

(i) the purported endorsements in respect of the back to back transfers to Abdul Hamid Dullih and then to Julita were *ultra vires* and procured by fraud and in any event were never registered on the land office copy of the land titles;

(ii) the various defendants including Iman Ali had colluded in a fraudulent scheme to deprive Kwan brothers of the said lands, in particular that Iman Ali had deliberately failed to notify Kwan brothers of the decision on the land enquiry and the removal of the caveats; and

(iii) the transfer to Hiew, the sublease to Gabungan and the charges in favour of the bank were otherwise defeasible on various other grounds.

[7] As regards the bank, it was Kwan brothers' case that the bank and/or its agents, including the bank's solicitors, Messrs Tan Pang Tsen & Co were put on notice of the collusion and/or fraud but were wilfully blind to it and that under the law, the bank is deemed to be guilty of the collusion and/or fraud. Kwan brothers pleaded that the bank knew or should have known that Hiew and Gabungan never had any interest over the lands as Julita was never a registered or beneficial owner of the lands nor had Julita any interest over the lands; that the bank was privy to the irregularities and/

or fraud and/or forgery committed in respect of the titles to the lands; that the charge to the bank is null and void as the purported charge was without the written permission of the Director of Lands and Surveys and was in breach of the conditions of the titles of the lands; and in the alternative, the charge is null and void by reason of forgery or tainted with fraud.

[8] Kwan brothers sought for *inter alia* a declaration that the 1992 SPA is valid and binding; that they are the beneficial and/or equitable owners of the lands and for the Registrar of the Native Titles to cancel the endorsements on the register document of titles to give effect to the preceding declaration.

[9] The common defence of the defendants in the counterclaim was essentially, to deny the allegations of conspiracy, collusion, fraud and/or forgery. They had also taken the common position that Kwan brothers' counterclaim was barred by limitation; that the 1992 SPA was null and void; that Hamid Dullih had lawfully transferred the lands to Julita and Julita to Hiew; and that Hiew is the *bona fide* purchaser for value. Julita counterclaimed against Kwan brothers for damages for trespass for the period of Julita's registration of the lands.

[10] The bank in particular, denied the allegation that its agents and/or solicitors had notice of the collusion and/or fraud and/or the irregularities evident on the two sets of land titles ie, the register document of titles and the issue document of titles of the said lands.

[11] The State Government pleaded that by virtue of s. 118 of the Land Ordinance, the issue document of title was conclusive evidence of ownership and that all dealings in respect of the lands were done in accordance with the provisions of the Land Ordinance. It was also submitted for the State Government that Kwan brothers had no *locus* to sue as they had not acquired any rights or interest in the lands under the 1992 SPA.

Findings Of The High Court

[12] The learned Judicial Commissioner ("JC") considered the issue whether Kwan brothers' counterclaim was statute-barred and the contention that Kwan brothers are not natives. His Lordship also considered whether there was indeed a decision by the ACLR on 29 January 2001 on the competing PAs; whether Kwan brothers had proven their counterclaim against the bank and the State Government; and on Julita's counterclaim against Kwan brothers.

[13] On whether the counterclaim was statute-barred, the learned JC made a finding of fact that there were three attempts to deprive Kwan brothers of the lands: the first in late 1999, the second attempt in January 2001 and the third in late 2004/2005. His Lordship relied on s. 18 and Schedule item 77 of the Sabah Limitation Ordinance (Cap 72) ("the Limitation Ordinance") to find that Kwan brothers' counterclaim was not statute-barred.

[14] Relying on the native certificates produced by Kwan brothers, and there being no other evidence adduced to show that the certificates were revoked, and considering the trite law that the civil court is not the proper forum to challenge the validity of the native status of Kwan brothers, the learned JC dismissed the contention that Kwan brothers are not natives.

[15] As to whether there was a decision on the land enquiry, the learned JC answered the issue in the negative. He gave his reasons as can be seen in paras. [18]-[25] of the grounds of judgment. Among the reasons were:

> 22. … if indeed, there was a decision in 2001, oral or otherwise, on the land Enquiry, I would expect Tony Vun or Julita or any of the other Defendants in the Counterclaim Action to forthwith, claim the said land which is 617 acres oil palm plantation with oil palm trees aged up to 8 years old as confirmed by the valuation report prepared in 2004 by VPC Alliance. Thus in 2001, the said land was already a mature oil palm plantation which was generating substantial income. It is simply irrational why Tony Vun opted to let the Kwan brothers and Kwantas enjoy the substantial income from the harvests of the 617 acres oil palm plantation for the next 4 years.

[16] As against the bank, the learned JC considered whether the bank at all material times had knowledge of Kwan brothers' interest over the lands; whether the bank is a party to the alleged fraud/forgery committed in respect of the titles for the lands; and whether the bank is a *bona fide* chargee for valuable consideration and without notice of Kwan brothers' interest. The learned JC resolved the issues in favour of the bank. His Lordship stated *inter alia* that the interest of Kwan brothers and Kwantas in the said land is merely an unregistered interest and relying on *Zainal Abidin Mohamed v. Roslan Abdul Aziz & Anor* [2003] 7 CLJ 132, held that mere knowledge of an unregistered interest does not amount to fraud.

[17] The learned JC dismissed Kwan brothers' counterclaim against the State Government on the ground that the tortfeasors were not cited as parties to the counterclaim and that the failure to name them as parties was fatal. His Lordship relied on the Federal Court decision in *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663; [2009] 1 MLJ 1.

[18] The learned JC had also dismissed Julita's counterclaim against Kwan brothers. However, no reasons were given by the learned JC as to his decision on Julita's counterclaim.

[19] Consequent to the above findings, the learned JC dismissed the original action and allowed Kwan Brother's counterclaim. His Lordship made *inter alia* the following orders:

(a) a declaration that Kwan brothers are entitled to possession and cultivation of the lands;

(b) an order dismissing the counterclaim action against the bank, the ACLR, the Registrar of Native Titles, Kinabatangan and the State Government;

(c) an order that the Registrar of Native Titles, Kinabatangan do cancel the endorsements contained in memorial sequence to No. 2 to memorial sequence to No. 11 on both sets of the titles of the lands save for the endorsements pertaining to the bank as the registered chargee of the lands; and

(d) an order that the Registrar of Native Titles, Kinabatangan do register a transfer of the lands to Kwan brothers subject to prior written permission for the transfer from the Director of Lands and Surveys in accordance with the conditions of the titles and subject to the bank's interest as a registered chargee of the lands.

[20] Aggrieved by the decision of the High Court, Kwan brothers and Kwantas appealed to this court against that part of the decision of the learned JC in dismissing their counterclaim against the bank and the State Government (Appeal No. 742).

[21] Hiew, Gabungan, Tony Vun and Julita appealed against the decision of the High Court in dismissing the original action of Hiew and Gabungan and in allowing the counterclaim of Kwan brothers (Appeal No. 3134).

[22] Hiew and Gabungan are also appealing against the order of the High Court in allowing Kwan brothers' and Kwantas' application *vide* encl. 912 for *inter alia* an accounts of the proceeds of harvesting the oil palm fruits on the said lands (Appeal No. 3135).

[23] In this judgment, parties will be referred to by their names. Hiew, Gabungan, Tony Vun, Julita, the Bank, the ACLR, the Registrar of the Native Titles and State Government of Sabah will continue to be referred to collectively as "the defendants in the counterclaim". Where the context requires, the ACLR, the Registrar and the State Government of Sabah will collectively be referred to as "the State Government".

The Appeals

[24] For brevity, we do not propose to set out each of the submissions of learned counsel for the respective parties, except to state that the appeals raised the following issues for our determination, namely:

(i) whether the 1992 SPA between Kwan brothers and Nur Sakandal was illegal and/or void *ab initio*;

(ii) whether Kwan brothers' counterclaim was barred by limitation;

(iii) whether Kwan brothers had proved their case of conspiracy, collusion, fraud or forgery; and

(iv) whether Julita's counterclaim ought to have been allowed.

[25] The issue on illegality was taken up as a preliminary point. When the appeals were first called up before us on 26 September 2018, learned counsel for Tony Vun and Julita had asked for an adjournment of the matter on the ground that there is a pending decision of the application for judicial review where the native certificates of Kwan brothers issued in 1979 were being challenged. The application for adjournment was supported by learned counsel for Hiew and Gabungan but objected to by Kwan brothers. The background to the application for adjournment is as follows.

[26] In respect of the native certificates of Kwan brothers, the learned JC had observed that there was no evidence to show that they had been revoked or invalidated. His Lordship opined that the High Court was not the proper forum to challenge the certificates, as such jurisdiction belonged exclusively to the native court.

[27] After the High Court had delivered its decision in 2011 in favour of Kwan brothers, Julita filed an application to review the native certificates issued to Kwan brothers which state that they are Sino-Kadazan. Julita succeeded in the District Native Court of Kota Kinabalu, where the District Native Court declared the native certificates of Kwan brothers as null and void and of no legal effect. Dissatisfied, the Kwan brothers appealed to the Native Court of Appeal. The Native Court of Appeal, presided by the learned Judicial Commissioner of the High Court, allowed the appeal and set aside the order of the District Native Court. Julita then took out judicial review proceedings. At the time of hearing before us, there was no decision on those judicial review proceedings.

[28] We had refused the adjournment for the reason that these appeals were long outstanding since 2011. We therefore proceeded to hear the appeals on 26 September 2018. When we resumed hearing on 30 October 2018, we were informed that the High Court had delivered its decision on the judicial

review application, where the High Court had quashed the decision of the Native Court of Appeal. The decision in the judicial review effectively meant that Kwan brothers are not natives. And since Kwan brothers are not natives of Sabah, they could not purchase the lands which are designated as native lands. Learned counsel for Tony Vun and Julita urged the court to consider the issue of illegality first which he submitted will obviate the whole appeals. The position taken by Tony Vun and Julita was supported by the other defendants in the counterclaim.

[29] It was emphasised that in essence, Kwan brothers were seeking for a transfer of the native lands to themselves, and that since they are not natives, the transfer would be an illegality and/or contrary to public policy. Reference was made to s. 64(1) of the Land Ordinance which states:

> This Part shall apply to lands held by natives and no non-native may purchase any land held under this Part, unless in accordance with the terms of s. 17 or acquire any interest therein by way of charge or otherwise.

[30] Reference was also made to the definition of 'native' in s. 2 of the Interpretation (Definition of Native) Ordinance (Sabah Cap 64), that a 'native' is:

> 2(1)(a) any person both of whose parents are or were members of a people indigenous to Sabah; or
>
> (b) any person ordinarily resident in Sabah and being and living as a member of a native community, one at least of whose parents or ancestors is or was a native within the meaning of paragraph (a) hereof.

[31] Section 3 of the Interpretation (Definition of Native) Ordinance was also referred to which reads:

> (1) Any person claiming to be a native may apply to a Native Court established under the Native Court Enactment 1992 and having jurisdiction in the area in which such person resides to declare:
>
> (a) that such person is recognised by native law and custom as the parent or child, as the case may be, of any other person; or
>
> (b) that such person is a member of a native community, has so lived during any stated period, and while so living has borne a good character; or
>
> (c) that such person is a member of a people named in paragraphs (c) or (d) of subsection (1) of section 2; or
>
> (d) that a parent of such person is or was a member of a people named in paragraph (c) of subsection (1) of section 2 and living, or if deceased is buried or reputed to be buried in Sabah.

[32] It was submitted for the defendants in the counterclaim that the learned JC erred in merely relying upon the certificates issued by the native court which had been adduced by Kwan brothers and in failing to take cognisance of the fact that the matters stated in the certificate were inconsistent with Kwan Ngen Wah's own testimony, wherein he admitted in cross-examination, *inter alia* that all his grandparents were born in China; his parents were not born in Sabah; he did not practice any native customs; he does not know how to speak Kadazan; and that when he was born, his father was not a citizen of the colony of North Borneo.

[33] It was thus argued that by ordering the transfer of the titles to Kwan brothers, the learned JC was actually aiding Kwan brothers to commit an illegality in breach of s. 64 of the Land Ordinance and/or in breach of public policy and was allowing Kwan brothers to benefit from their own wrongdoing. On the ground of illegality alone, it was submitted that the decision of the learned JC ought to be reversed and the appeals be allowed.

[34] We were mindful of the fact that there was no stay of the High Court order on the judicial review application. However, we were informed by learned counsel for Kwan brothers that Kwan brothers had filed an appeal against the decision of the High Court. Given the circumstances and while we accept that the court is bound at all stages to take notice of illegality and that the court must not aid any illegal act (see *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619; *Accruvest Hotel Management v. Pengurusan Kolej Legenda Sdn Bhd & Anor* [2010] 1 LNS 278), we were of the view that the issue concerning the native status of Kwan brothers and hence the illegality of the transaction in respect of the native lands, is not yet conclusive, more so when there had been an earlier challenge by one Hassnar bin Hj. Ebrahim on the native certificates of Kwan brothers. Hassnar failed in that challenge and as it stands, there are presently conflicting decisions from the native court on whether Kwan brothers are natives. We therefore declined to determine the appeals on the sole ground of illegality and proceeded to hear the parties on the other grounds of appeal.

[35] Quite apart from relying on the decision of the High Court in the judicial review application that Kwan brothers are not natives and hence the sale and purchase of the lands is illegal, the bone of contention of the defendants in the counterclaim was that the 1992 SPA was void *ab initio* for the following reasons:

(i) in 1992, the natives only had logging rights;

(ii) Nur Sakandal admitted in his statutory declaration that the PA given to him by the 45 natives was a forgery;

(iii) 31 natives affirmed a statutory declaration stating that they never gave any power to Nur Sakandal; and

(iv) the lands were only approved for agricultural purposes in July 1999.

[36] It was therefore submitted for the defendants in the counterclaim that in the circumstances, the PA granted to Nur Sakandal was void and invalid; that Nur Sakandal had no authority whatsoever to deal with the lands; that the 46 natives never had any rights to sell the land in 1992 because in 1992, the lands were still State lands and the natives' applications for the lands were only in respect of logging; and that the learned JC had therefore erred in law and in fact in ordering the lands to be transferred to Kwan brothers.

[37] The defendants in the counterclaim were basically relying on the maxim *nemo dat quod non habet* which means no one gives what he does not have. Reliance was also placed on r. 2(4) of the Land Rules G.N. 505/1930 which reads: "No payments made under sub-r. (3) shall confer any right whatsoever to the land applied for and acceptance of any such payment shall not constitute any undertaking that the application will be approved."

[38] On limitation, it was the submission of the defendants in the counterclaim that there was already an actionable cause of action by Kwan brothers on the following three instances when Kwan brothers had confirmed that they were aware of the alleged purported fraud being committed against them, namely:

(i) when Kwan brothers knew about Hamid Dullih in late 1999;

(ii) when Kwan brothers lodged the caveats on the lands on 24 February 2000; and

(iii) by Kwan brothers' solicitor's letter dated 6 February 2001.

[39] The defendants in the counterclaim thus contended that the counterclaim filed by Kwan brothers in February 2006, seven years after they first knew of the fraud, was clearly barred by limitation.

[40] The counterclaim by Kwan brothers against Tony Vun, Julita, Hiew and Gabungan which was allowed by the learned JC was based on fraud and conspiracy. Learned counsel for the defendants in the counterclaim highlighted that the learned JC did not make any finding of fraud against them beyond reasonable doubt, which was the correct standard of proof at the material time, yet His Lordship allowed the counterclaim. In this regard, it was also submitted that the learned JC had correctly dismissed the counterclaim against the bank and the State Government and that by reason of the said dismissal, there cannot be a case of conspiracy and fraud against

Kwan brothers. Further, the learned JC did not identify in his judgment, the particulars of alleged fraud by Julita, Tony Vun or Hiew or the acts of Tony Vun, Julita or Hiew which amounted to fraud on Kwan brothers. Neither did the learned JC state that Julita, Tony Vun or Hiew had committed fraud.

[41] The defendants in the counterclaim had also submitted that there was no evidence led as to the alleged misrepresentation by Hamid Dullih to the land office or on the allegations of fraud and forgery by the defendants in the counterclaim. Further, because Kwan brothers had withdrawn their counterclaim against Hamid Dullih, the allegations of collusion or conspiracy against the other defendants in the counterclaim must necessarily fall.

[42] And since fraud had not been proved by Kwan brothers, the learned JC erred in law and in fact in dismissing Hiew's and Gabungan's claim and in granting the declaratory reliefs sought by Kwan brothers for the lands to be transferred to Kwan brothers.

[43] In opposing the appeal by the defendants in the counterclaim, learned counsel for Kwan brothers submitted that the defendants in the counterclaim had not met the 'plainly wrong' test.

[44] Learned counsel highlighted the relationship between the parties, ie, that Hamid Dullih was a general worker of Tony Vun and that Julita, a native and a housewife is married to Jimmy Vun. Jimmy Vun is the brother of Tony Vun. Hiew had known the Vun brothers for more than 20 years. Learned counsel further highlighted the following facts:

(i) the purchase of the lands by Hamid Dullih was not documented and there was no mention of any purchase price;

(ii) there were actual/real discrepancies between the register documents of title ("the office copy") and the issue documents of title ("the owner's copy") in relation to Julita's transactions;

(iii) as at the date of registration of transfer to Hamid Dullih and back to back to Julita, the office copy of the document of titles was not signed;

(iv) Julita's name was not found in the office copy of 26 out of 46 titles of the lands;

(v) the land office audit confirms that the office copy of the document of titles was highly irregular; and

(vi) Hamid Dullih admitted that he did not make payment to Nur Sakandal when he allegedly bought the lands and neither did he receive payment from Julita when he supposedly sold the lands.

[45] It was submitted for Kwan brothers that the learned JC was correct in his finding of fact that there was no decision, oral or otherwise, on the land enquiry on 29 January 2001 as evidenced by the various letters written by the solicitors for Kwan brothers, asking for the decision. It was further submitted for Kwan brothers that the decision on the land enquiry was only made on 22 March 2001 and hence, the caveats lodged by Kwan brothers were wrongfully removed on 2 February 2001. Learned counsel argued that there was conspiracy by way of abuse of office by Iman Ali as the transactions or the back to back transfers to Hamid Dullih and then to Julita on 5 February 2001 were unlawful and improper as they can only be made after the lapse of the appeal period ie, one month from the date of decision by ACLR and that, there was no permission from the Director of Lands and Surveys for the transfer of the lands to Julita.

[46] Learned counsel for Kwan brothers had drawn our attention to the entries on the removal of the caveats on 2 February 2001 and the register book for the 2001 endorsements (No. 2 to No. 5) which were not entered in a chronological fashion on a day to day basis as they should have been and are ordinarily or normally done in the course of business; and that when the transfers to Hiew were effected between March 2005-September 2005, 90% of the balance purchase price remained unpaid and this defies business logic and common sense. These facts, according to learned counsel for Kwan brothers, raise grave doubts as to the *bona fides* of the sale between Julita and Hiew.

[47] On limitation, it was the submission for Kwan brothers that the learned JC was correct in his finding that the counterclaim was not statute-barred, as Kwan brothers first came to know about Hiew being the registered owner of the lands only in 2005.

[48] Learned counsel further submitted that the learned JC, however, erred in dismissing Kwan brothers' counterclaim against the bank as the charges are void, that the bank cannot claim to be a *bona fide* chargee because of its failure to make obvious enquiries of the discrepancies in the titles, the status of the lands as a cultivated plantation and the fact that a common solicitor Edwin Tsen of Messrs Tan Pang Tsen & Co, acted for all the parties at the same time, namely the buyer, the seller, the sublessee, the chargor and the chargee. In support of his submissions, learned counsel relied on *inter alia* the case of *United Malayan Banking Corp Bhd v. Syarikat Perumahan Luas* [1988] 1 CLJ 577; [1988] 2 CLJ (Rep) 522; [1988] 3 MLJ 352b; *Malayan Banking Bhd v. Neway Development Sdn Bhd & Ors* [2017] 9 CLJ 401; and *T. Sivam a/l Tharamalingam v. Public Bank* [2018] MYFC 11.

[49] As against the State Government, learned counsel for Kwan brothers argued that the instant case falls outside the principle of *Lay Kee Tee (supra)* which was to notify the principal of the officer who is the tortfeasor. Here, the State Government knew from the beginning that the tortfeasor was Iman Ali.

[50] Further, learned counsel for Kwan brothers argued that when Kwan brothers bought the lands in 1992, it was a clear purchase of beneficial interest and that it was the duty of Nur Sakandal to get everything done for the issuance of the titles to the lands.

Our Decision

Whether The 1992 SPA Was Illegal And Void By Reason That Kwan Brothers Are Not Natives

[51] We do not deem it necessary to deal with this issue any further having set out the crux of the submission and our position above.

Whether Kwan Brothers Had Acquired Any Rights Or Interest In The Lands Pursuant To The 1992 SPA

[52] The dispute before us in respect of the competing claims arose out of the registered interest of Hiew as owner, Gabungan as sublessee and the bank as chargee of the said lands on the one hand, and of Kwan brothers' equitable/beneficial interest, on the other hand.

[53] The rights and interest claimed by Kwan brothers arose from PA 825/92 which was granted by the 45 natives to Nur Sakandal, the substituted PA 855/92 granted by Nur Sakandal to Kwan brothers and the 1992 SPA.

[54] Before we deal with Kwan brothers' counterclaim, it is perhaps prudent to first deal with the main claim by Hiew and Gabungan for possession of the lands which had been dismissed by the learned JC.

[55] Hiew claimed that he is a *bona fide* purchaser for value without notice of Kwan brothers' interest; that he had paid the full purchase price of RM6.172 million to Julita; that he is entitled to possession of the lands and that Kwan brothers and Kwantas are trespassers or squatters on the lands. Likewise the case for Gabungan.

[56] It is trite law that one who asserts must prove. It is thus incumbent on Hiew to prove that he had paid the consideration of RM6.172 million to Julita in full. In this regard, it is pertinent to note that the consideration involved is a huge sum of money. Except for the amount of RM200,000 and RM300,000 which can be seen from the payment vouchers dated 23 November 2004, we find that apart from the bare assertion of Hiew that

he had paid the purchase price, there is absolutely no documentary proof that payment for the lands had been made by Hiew to Julita. Even the purported payment of deposit of RM500,000 evidenced by the payment vouchers adverted to above, did not show that the said sum had in fact been received by Julita.

[57] We are mindful of the oral testimony of Hiew that all payments to Julita were made by cash. Then again, there was no evidence led as to the dates the respective payments were made to Julita. What is apparent though is that in the transaction between Hiew and Julita, the parties had not acted according to the terms of the 2005 agreement. Although the agreement provides for termination of the SPA for failure to pay the purchase price on or before 30 June 2005, the termination clause was not utilised or applied by Julita. Not only was the 2005 SPA not terminated, the transfers from Julita to Hiew were effected long before the purchase price was paid. Hiew testified that it was Jimmy Vun who insisted that the transfers to Hiew be effected even before the payment of the purchase price.

[58] Learned counsel for Tony Vun and Julita submitted that it is entirely up to the parties how to conduct themselves. While that may be so, it begs the question, why would Jimmy Vun (who is not a party to the 2005 SPA) insist on the transfer of the lands to Hiew before the purchase price of over RM6 million was paid to Julita, and why have an agreement if from the beginning parties do not intend to be bound by its terms. More importantly, with the backdrop of the relationship between the parties as alluded to above, the pertinent question is whether the 2005 agreement is in fact a genuine sale and purchase agreement for the lands between Julita and Hiew. As submitted by learned counsel for Kwan brothers, it defies common sense and business logic for the transfers to be effected to Hiew before the purchase price be paid to Julita.

[59] Insofar as the sublease was concerned, after Hiew and Gabungan had closed their case in the High Court and in the midst of the case for Kwan brothers in May 2011, Hiew and Gabungan had sought to tender a deed of variation to show that in 2005 the consideration for the sublease was varied from RM1 for 90 years to RM10,000 per month. The evidence revealed that although the deed of variation was purportedly dated 13 June 2005, the cover page had the new office address of Messrs Tan Pang Tsen where Messrs Tan Pang Tsen had only moved to the new premises in December 2007, as shown by the notice issued to all the legal firms and the courts. Although Hiew and Gabungan did not thereafter pursue the deed of variation, we opine that the conduct of Hiew and Gabungan was clearly an act to mislead the court and it brought to the fore the credibility of Hiew and with respect, even that of the solicitor concerned.

[60] The conduct of creating the deed of variation belatedly in the midst of the trial to bolster Hiew's and Gabungan's case fortifies our view that the transaction in respect of the 2005 SPA and the sublease was a sham, entered into to deprive or defraud Kwan brothers of their beneficial interest in the lands. If the sublease was a genuine transaction, surely there was no need for Hiew and Gabungan to create and introduce the deed of variation.

[61] It was contended for the defendants in the counterclaim that if the transfer from Hamid Dullih to Julita cannot be challenged by reason that the counterclaim against Hamid Dullih was not pursued, then the transfer from Julita to Hiew similarly cannot be challenged. We disagree. Notwithstanding that the counterclaim against Hamid Dullih was not pursued by Kwan brothers as it was struck out by Hamid Sultan J in the first trial for non-service, we are of the view that given the relationship between the parties and the back to back transfers, it is still open for us to consider the transfer from Julita to Hiew, despite the fact that Hamid Dullih, from whom Julita had purportedly bought the lands, is no longer a party to the counterclaim. In other words, the striking out of the counterclaim against Hamid Dullih does not affect the plea of collusion against Hamid Dullih and Tony Vun and it does not affect Kwan brothers' case against the remaining defendants in the counterclaim and their right to raise that issue.

[62] We observe that in respect of the sale from the natives to Hamid Dullih, there was no evidence of any sale and purchase agreement. There was also no evidence of the purchase price agreed upon and neither was there evidence of any payment by Hamid Dullih to the natives. On the contrary, Hamid Dullih testified that he did not pay the natives and neither was he paid by Julita.

[63] Learned counsel for Tony Vun and Julita submitted that Hamid Dullih cannot testify against documentary evidence. In this regard, learned counsel relied on the memorandum of transfers which contained the consideration for the transfers of the lands from the natives to Hamid Dullih. In our judgment, in the face of the specific challenge by Kwan brothers of the *bona fides* of the transaction, the fact that the consideration was mentioned in the memorandum of transfers is insufficient to prove that payment of the lands had in fact been made by Hamid Dullih to the natives.

[64] Given the facts and circumstances of the case and the direct testimony of Hamid Dullih, we conclude that no consideration had passed from Hamid Dullih to the natives, neither was there any from Julita to Hamid Dullih or from Hiew to Julita. We agree with Kwan brothers that the transfer of valuable lands to the buyer without payment of the purchase price at the insistence of the purported seller cannot be anything, but a sham. And absent

any consideration, we find that Hiew had not proved his case that he was a *bona fide* purchaser of the lands for value. It follows that Hiew and Gabungan had no rights over the lands and were not entitled to seek possession of the lands. The learned judge was therefore correct to dismiss both Hiew and Gabungan's claim against Kwan brothers and Kwantas.

[65] We now move on to Kwan brothers' counterclaim which was premised on the 1992 SPA and the PA.

[66] The PA 825/92 dated 10 November 1992 states *inter alia* that:

> WHEREAS by PT No. 84092242-84092287, we are the successful applicants of a parcel of land measuring an area of 690 (Six Hundred and Ninety Only) Acres more or less and such situate at Sungai Latangan, in the District of Kinabatangan, Sandakan, Sabah. (hereinafter called "The Said Lands").
>
> AND WHEREAS we are desirous of appointing HADJI NUR BIN SAKANDAL (I/C H0241513) of Sandakan, in the State of Sabah, Malaysia aforesaid to be our attorney for us and on our behalves to do and execute certain acts and things with respect to the said land as hereinafter provided.
>
> NOW THIS DEED WITNESSETH that we, the aforesaid Undersigneds hereby appoint the said HADJI NUR BIN SAKANDAL (I/C H0241513) to be our attorney for us and on our behalves to do and execute certain acts and things with respect to the said land as hereinafter provided.
>
> 1. To take possession of the said land forthwith and to manage and superintend the management of the same, to cultivate and develop the same in compliance with the special terms and conditions in the land or for building purposes or otherwise if permissible to mortgage charge lease let …
> 2. …
> 3. To sell and transfer effectively the said land to any person or persons or to body-corporate or to our attorney himself for his own benefits as and when our attorney deems fit or **when and if the transfer thereof is permissible.** (emphasis added)

[67] *Vide* a surat pengakuan, 31 native applicants made a declaration that they never executed the PA nor executed the agreement for the sale of the lands to Kwan brothers. The relevant paragraphs in the declaration read:

> 1. Pemilik tanah … seluas lebih kurang 630 ekar termasuk orang yang mati terletak di Sungai Latangon, Kinabatangan.
> 2. Kami tidak pernah memberi atau menanda tangani sebarang Surat Kuasa yang dibuat oleh Hj Nur Bin Sakandal, K/P No. H.0241513 seperti yang berdaftar No. 825/92 di mahkamah Sandakan.

3. Atau Surat Perjanjian Jual/Beli tanah yang kami miliki kepada En. Kwan Ngen Chung K/P No. H.0469507 atau kepada En. Kwan Ngen Wah K/P No. H.0266233 dan tidak pernah memberi agen atau kuasa kepada mana-mana pihak kecuali En. Abd Sani Abu Bakar KPT No.460203-12-5207 dan En. Ahmad Sah Bin Abau KPT No.490116-12-5247 sebagai pemegang Surat Kuasa yang sah.

4. Oleh itu sebarang dokumen atau tanah yang dibeli oleh En. Kwan Ngen Chung atau En. Kwan Ngen Wah yang berkaitan dengan tanah yang tersebut adalah tidak sah kerana tanpa pengetahuan atau izin kami.

[68] By way of a declaration dated 18 June 1999, Nur Sakandal had also declared that he had forged the signatures of the 46 native applicants in the PA, wherein he states *inter alia* that:

> (3) Di sini saya, Hj. NUR BIN SAKANDAL … membuat pengakuan untuk membatalkan Surat Kuasa Penuh yang telah diberikan oleh Ahli pemohon kepada saya melalui Surat Kuasa yang berdaftar No. 852/92 melalui Mahkamah Sandakan dengan serta merta sebaik sahaja Surat Kuasa ini saya tanda tangani sebab saya membatalkan Surat Kuasa Penuh ini, saya mengaku telah membuat kesilapan, iaitu menanda tangani nama-nama Ahli pemohon tanah yang terdapat di dalam Surat Kuasa Penuh tersebut dan saya tidak mahu bersebahat dengan mana-mana pihak syarikat kerana iaitu Surat Kuasa tersebut adalah tidak benar.

[69] Nur Sakandal did not testify but the documentary evidence in the form of the various declarations were before the court. It was thus submitted for the defendants in the counterclaim that the learned JC erred in law and fact in failing to consider the validity of PA 852/92 and that in any event as at the date of the 1992 SPA, the natives had no rights and interest on the lands to pass it to Kwan brothers. In the circumstances, Nur Sakandal did not have any rights whatsoever to the lands as stated in PA 852/92 to sell the lands to Kwan brothers. The defendants in the counterclaim further submitted that the learned JC was thus plainly wrong in granting an order that the lands be transferred to Kwan brothers.

[70] We have some concerns on the declaration by the 31 natives. First, the declaration was not dated. Second, only 31 natives signed the declaration purportedly denying granting the PA to Nur Sakandal. What then was the position taken by the other 15 natives? If the 15 natives had since passed on, what was the position taken by their beneficiaries?

[71] As regards the declaration by Nur Sakandal admitting that he forged the signatures of the 45 natives on the PA, the declaration cannot be true on the face of it because not all 45 natives had signed the PA. Some of the 45 natives had put their thumbprint. There was no allegation that the thumbprints of those natives were also forged by Nur Sakandal.

[72] Further, after the purported admission of the forgery by Nur Sakandal, by a declaration dated 13 September 1999, he had confirmed that:

> 2. Dan saya mewakili pihak 46 pemilik tanah … dan bagi pihak mereka, telah menandatangani surat perjanjian SALE AND PURCHASE AGREEMENT yang bertarikh 19hb November 1992 sebagai bukti persetujuan serta pengesahan untuk menjualkan kawasan di bawah PT. 84092242-84092287 seluas lebih kurang 690 ekar iaitu kepada ENCIK KWAN NGEN WAH … dan ENCIK KWAN NGEN CHUNG ..
>
> 3. Dan sehingga hari ini, iaitu 13HB SEPTEMBER 1999, saya mengesahkan bahawa saya mewakili 46 pemilik tanah di atas bagi pihak mereka telah menerima Ringgit Malaysia berjumlah lima puluh dua ribu tujuh ratus enam puluh dua (RM52,762.00) sahaja daripada Encik Kwan Ngen Wah dan Encik Kwan Ngen Chung. Wang tersebut telah saya bahagikan serta bayarkan kepada 46 pemilik tanah tersebut di atas masing-masing. Dan baki yang mana dihutang oleh Encik Kwan Ngen Wah dan Encik Kwan Ngen Chung kepada saya hanya tinggal Ringgit Malaysia sembilan ribu dua ratus tiga puluh lapan (RM9,238.00) sahaja. Bayaran tersebut hanya akan dijelaskan kepada saya setelah geran tanah untuk kawasan tersebut di atas dikeluarkan oleh pihak Jabatan Tanah dan Ukur, Kota Kinabalu.

[73] Hence, if one were to rely on the declaration of Nur Sakandal in June 1999 purportedly admitting to the forgery of the PA 825/92, then likewise Nur Sakandal's declaration dated September 1999 cannot be overlooked. In the light of the latest declaration by Nur Sakandal, it cannot be said that the learned JC failed to consider the declarations made by Nur Sakandal.

[74] On the 1992 SPA, the Preamble reads:

> Whereas by PT Nos 84092242-84092287 we are the successful applicants of a parcel of land measuring an area of 690 acres … .

The evidence however disclosed that as at the date of the 1992 SPA, the natives were not the successful applicants to the title of the lands. What the natives had at that point was merely the logging rights. It was only in 1999 that the lands were alienated to the natives for agricultural purposes.

[75] In the light of the above, the defendants in the counterclaim contended that Kwan brothers have no *locus standi* to sue and have no interest in the lands. In support of their contention, they relied *inter alia* on the case of *Hon Chung Lip v. Kwan Ngeh Wah* [2012] 1 LNS 255; [2012] 5 MLJ 356 where this court held that under s. 88 of the Land Ordinance, interests in land are only recognised upon registration. In *Ho Chung Lip (supra)*, at the material time, the appellant had purchased land applications only and as the interest was not yet registered, it was held that he had no interest over the lands and was not successful in recovering the lands from the occupants.

[76] With respect, we are reluctant to follow the earlier decision of this court in *Ho Chung Lip* as we are not clear on the terms of the agreement between the parties in that case. In the instant case, while the Preamble to the 1992 SPA had inaccurately stated that the natives were the successful applicants of the lands, we find that the 1992 SPA as a whole, had set out the intention of the natives and Kwan brothers quite clearly ie, that the sale and purchase was, at that point, the sale and purchase of the beneficial interest of the natives in the said lands. This is manifest from the following:

> AND WHEREAS the issue title deed to the said land is yet to be issued by the Director of Land & Surveys.
>
> …
>
> … IT IS HEREBY AGREED as follows:
>
> 1. In consideration of the terms herein provided, the Purchasers hereby agree to purchase from the Vendor the said land free from encumbrances but subject to the special terms and conditions to be imposed by the Directors of Lands & Surveys at the agreed purchase price of Malaysian Dollars One Hundred (M$100.00) only per acre based on actual acreage available after issuance of title deed. …
> 2. …
> 3. The full balance of purchase price shall be paid immediately after the Native Title Deed to the said land has been issued, registered and sealed.
> 4. …
> 5. The Vendor shall be responsible to obtain the title deed at his own costs and expenses.
> 6. …
> 7. The Vendor shall upon the signing of this Agreement execute a Substitution under a Power of Attorney in favour of the Purchasers among other things the power to enter and develop the said land to comply with the special terms and conditions aforesaid and to sell and transfer the said land to any person or persons the Purchasers deem fit including the Purchasers themselves.
> 8. The Vendor shall deliver possession of the said land to the Purchasers upon the signing of this Agreement or when the entry to the said land **is permissible** by the Director of Lands & Surveys.
> 9. …
> 10. …

A

11. Upon the full payment of the purchase price **and if the transfer of the said land is permitted** the Vendor shall execute a valid and registrable Memorandum of Transfer transferring the said land to the Purchasers …

12. ..

B

13. …

14. …

15. …

16. …

C

17. ...

18. …

19. The Purchasers hereby represent/warrant that they are Bumiputras/ Natives and are qualified to purchase the said land and that the same can be registered in their names. (emphasis added)

D

[77] In our view, Kwan brothers had the *locus* to sue under the SUPA 855/ 92 and the 1992 SPA. We are further of the view that there is a valid sale and purchase of the beneficial interest in the lands by the natives to Kwan brothers and given the express provision in the 1992 SPA that the transfer

E

to Kwan brothers is conditional upon the approval of the Director of Lands and Surveys, we hold that the 1992 SPA is not void for illegality under s. 24 of the Contracts Act 1950. Neither does the 1992 SPA offend s. 88 of the Land Ordinance which provides:

F

> No new title and no dealing with, claim to or interest in any land except land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this Part.

The issue of *nemo dat quod non habet* is answered by considering the totality of the terms and conditions of the 1992 SPA. We further agree with learned

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counsel for Kwan brothers that r. 2(4) of the Land Rules applies to the land office and the land applicants and that it cannot be the basis to find that the 1992 SPA is illegal or bad in law.

Whether Kwan Brothers' Counterclaim Was Barred By Limitation

H

[78] It was the contention of the defendants in the counterclaim that from Kwan brothers' own pleadings, they first became aware in late 1999 of the wrong committed by Hamid Dullih and that in his oral evidence, Kwan Ngen Wah stated that Kwan brothers became aware in 1999 that Tony Vun had used someone to claim that there was another PA from the 46 native

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applicants in respect of the lands.

[79] The defendants in the counterclaim submitted on the fact that Kwan brothers had lodged caveats dated 24 February 2000 to protect their interest and rights in and on the lands, and that prior to the lodging of the caveats, the solicitors for Kwan brothers had written a letter dated 4 January 2000 to Penolong Pemungut Hasil Tanah, Kota Kinabalu to complain about the collection of the draft titles by a third party. The letter also mentioned that Kwan brothers will be commencing legal action in court to protect their rights and interest to the lands. By way of their solicitors' letter dated 6 February 2001, Kwan brothers notified the Registrar of Lands that they would be filing an action in court for the declaratory reliefs now being sought by Kwan brothers in the counterclaim action.

[80] In view of the above, it was argued by the defendants in the counterclaim that Kwan Brothers' case against them was barred by limitation.

[81] The essence of Kwan brothers' case against the defendants in the counterclaim was that the said defendants conspired or colluded with Hiew and Gabungan to purportedly sell the land to Hiew and thereafter to sublease to Gabungan, in an attempt to defeat Kwan brothers' rights and interest in the lands. Kwan brothers had sought, *inter alia* for a declaration that the purported transfer to Hiew and the sublease to Gabungan was a sham.

[82] As regards the State Government, the basis of the allegation of fraud was in relation *inter alia* to the entries for the transactions in 2001 where the evidence revealed that the entries in the register document of title on the removal of the caveats lodged by Kwan brothers and the registration of the new transfers were not signed by the ACLR. Another aspect of the fraud alleged against the State Government was the absence of the decision by the ACLR on the land enquiry and/or for the withholding of the notification of the purported decision of the enquiry that the caveats were being removed.

[83] It was the position taken by Kwan brothers that so long as the caveats remain and the decision of the ACLR was pending, the need for them to file an action did not arise because their interest was fully protected. Further, as provided for in s. 41(2) of the Land Ordinance, no court could intervene when the matter was pending within the jurisdiction of the ACLR. It was thus the case of Kwan brothers that they were deliberately kept in the dark over the purported removal of the caveats by any decision and/or the withholding of the service of the ACLR's decision on Kwan brothers.

[84] The learned JC had made a finding of fact that in total there were three attempts to deprive Kwan brothers of the lands, beginning from 1999 until late 2004/2005. On our part, we find that while Kwan brothers may have known about Hamid Dullih in 1999, the knowledge about Tony Vun, Julita,

Hiew and Gabungan and the allegation of conspiracy and fraud or forgery against the rest of the defendants in the counterclaim only came about in 2005 ie, by Hiew's solicitor's letter dated 1 March 2005 and 14 November 2005 informing Kwan brothers that the lands had been transferred and registered in Hiew's name, and seeking vacant possession. It was also only in March 2005 that Kwan brothers wrote to the Director of Lands at Kota Kinabalu complaining that no decision was given on the land enquiry.

[85] A cause of action accrues when there exists a person who can sue and be sued and there exists an entire set of facts that gives rise to an enforceable claim (see *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32). In the instant case where Kwan brothers sought to set aside the registration of Hiew's name as the owner and Gabungan as the sublessee of the lands, the person(s) who can be sued and the entire set of facts that gives rise to an enforceable claim *vis-a-vis* the impugned transaction arising out of the 2005 SPA were only present in 2005. That was the time when Kwan brothers had knowledge of Hiew and Gabungan.

[86] Section 18 of the Limitation Ordinance provides:

> Effect of fraud
>
> 18. When any person having a right to institute a suit has by means of fraud been kept from the knowledge of such right or of the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit:
>
> (a) against the person guilty of the fraud or accessory thereto; or
>
> (b) against any person claiming through him otherwise then in good faith and for a valuable consideration,
>
> shall be computed from the time when the fraud first became known to the person injuriously affected thereby or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

[87] Under item 77 of the Schedule of the Limitation Ordinance, the period of limitation for a suit filed to set aside a decree obtained by fraud, or for other relief on the ground of fraud, is three years from the time when the fraud becomes known to the party wronged.

[88] As adverted to above, Kwan brothers' cause of action in the counterclaim is to impugn the ownership of Hiew and the sublease to Gabungan which interests were only acquired by Hiew and Gabungan from the 2005 SPA. Kwan brothers only knew about Hiew and Gabungan in 2005. The earliest time that Kwan brothers had knowledge of Hiew's claim that he

is the legal owner of the lands was in March 2005. The counterclaim filed on 14 February 2006 is thus well within time as provided by s. 18 read with item 77 of the Schedule of the Limitation Ordinance. Hence, the learned JC did not err in holding that the counterclaim of Kwan brothers was not barred by limitation. The same reasoning applies to the other defendants in the counterclaim in that no cause of action would have arisen against any of them until the final act of registering the title to the lands in Hiew/Gabungan. Until then, the cause of action was neither complete nor actionable.

Whether Kwan Brothers Had Proved Fraud/Conspiracy Against The Defendants In The Counterclaim

[89] Kwan brothers and Kwantas contended that Hamid Dullih had colluded with and/or acted under the direction of Tony Vun, both with knowledge that the lands had already been sold to Kwan brothers and to induce or attempt to induce some of the 46 natives to breach their agreement with Kwan brothers in respect of the 1992 SPA.

[90] Kwan brothers and Kwantas also contended that Hiew and Gabungan together with Hamid Dullih, Tony Vun, Julita, ACLR and the Registrar had colluded, conspired and fraudulently transferred the lands to Julita and thereafter to Hiew. Kwan brothers pleaded fraud in the counterclaim action and in the circumstances, the burden is on Kwan brothers and Kwantas to prove the elements of fraud.

[91] It was submitted for the defendants in the counterclaim that the learned JC never found any evidence of fraud against Hiew in respect of the purchase of the lands; that the learned JC never made any findings of fraud against Gabungan, Tony Vun or Julita and that Kwan brothers had not adduced any evidence whatsoever in support of the allegations of fraud against Hiew and Gabungan. And because the learned JC had concluded that the counterclaim was unsustainable against the State Government on the ground that the tortfeasors were not made parties to the proceedings, His Lordship did not make any determination whether the ACLR, the Registrar of Native Titles or anyone had either conspired, colluded or committed fraud with Tony Vun and Julita.

[92] We accept the submission by the defendants in the counterclaim that the learned JC did not make any specific findings of fraud against Tony Vun, Julita, Hiew and Gabungan. While this aspect of the judgment of the learned JC is not very satisfactory, we must not lose sight of the fact that His Lordship had allowed Kwan brothers' counterclaim against Tony Vun, Julita, Hiew and Gabungan which must necessarily mean that the learned JC was satisfied that Kwan brothers had proved their case against them respectively. Be that as it may, we will proceed to consider whether Kwan brothers had proved their case against the defendants in the counterclaim.

[93] We will first deal with the standard of proof on fraud. It was decided by the Federal Court in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584 that where fraud is alleged in a civil claim, the standard of proof is on the balance of probabilities. In *Sinnaiyah*, the Federal Court made it clear that "this judgment only applies to this appeal and to future cases …". The instant case was decided by the learned JC before the Federal Court decision in *Sinnaiyah*. His Lordship applied the standard of beyond reasonable doubt, which was appropriate at that time. Taking the same approach as the Federal Court did in *Sinnaiyah*, we rule that in considering the issue of fraud in these appeals, the standard of proof to be applied is on the balance of probabilities.

[94] As to what amounts to fraud, *Lian Keow Sdn Bhd (In Liquidation) & Anor v. Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 1 LNS 44; [1988] 2 MLJ 449; *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ 465 propounded the principles that 'fraud' means 'actual fraud or dishonesty of some sort, not what is called constructive or equitable fraud' and that 'notice of an unregistered interest may not amount to fraud sufficient to defeat a registered proprietor's right'. Fraud exists where there is a designed objective to cheat a person of an existing right (see *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1983] 1 LNS 21; [1983] 2 MLJ 196) and whether fraud exists is a question of fact to be determined in the light of the facts and circumstances surrounding each particular case (see *P.J.T.V. Denson (M) Sdn Bhd v. Roxy (Malaysia) Sdn Bhd & Ors* [1980] 1 LNS 55; [1980] 2 MLJ 136; *Suratmin Othman v. Yusof Omar & Ors* [1998] 2 CLJ Supp 380).

[95] By his own pleadings, Hiew admitted that he had visited the lands prior to the purchase and saw that it was a fully cultivated oil palm plantation with Kwantas' signboard on it. Hiew knew the lands were occupied but Hiew did not take any steps to inquire into the nature of Kwan brothers' interest (or even Kwantas') in the lands. Neither did Hiew make further inquiries into how Julita was claiming a right to sell a fully cultivated oil palm plantation as registered owner, even though Julita did not cultivate the lands.

[96] The instant case is not merely about the defendants in the counterclaim having notice of Kwan brothers' unregistered interest. It is about the conduct of and the acts done by the defendants in the counterclaim to facilitate the sham transaction to come to its fruition and to cheat Kwan brothers of the lands over which they had acquired beneficial interest pursuant to the SUPA 855/92 and the 1992 SPA. It has been proved, as stated in the earlier part of this judgment that the transactions between Hiew and Julita for the purchase of the lands without payment of the purchase price are sham transactions schemed up to defraud Kwan brothers of their interests in the lands.

[97] In respect of the bank, the grievance of Kwan brothers was that the learned JC failed to address, firstly the issue whether the charges are void for the bank's failure to obtain the written consent of the Director of Lands and Surveys as required by the conditions of titles. Secondly, the bank cannot claim to be a *bona fide* chargee because of its failure to make obvious enquiries of the discrepancies in the titles and the status of the lands as a cultivated plantation, given the fact that a common solicitor was acting for all the parties at the same time.

[98] We find merits in Kwan brothers' grievance and much force in the submission of learned counsel for Kwan brothers that the registration of the charge without the written permission of the Director of Lands and Surveys was bad and that there is no provision in the Land Ordinance for the retrospective application to cure a defect except by a fresh memorial. Even if this submission of Kwan brothers cannot be sustained, we are of the view that the belated written permission in itself, coupled with the other facts and surrounding circumstances adverted to earlier, is indicative of something terribly amiss in the transaction.

[99] The law is settled that knowledge of the bank's agents is imputed to the bank. Chin Yun Seong (DW8) was the bank's valuer who had prepared the valuation report for purposes of the banking facilities to Hiew. DW8 knew that the lands were cultivated into an oil palm estate owned by Kwantas called Pintasan Estate. DW8 had expressly stated that he did not obtain the extract copies of the land titles from the Kinabatangan Land Office and he had advised that a solicitor be engaged to verify the title documents. DW8 had also stated in his valuation report on the special terms of the lands ie, that transfer, sublease, charge or subdivision of the title is prohibited without the written permission of the Director of Lands and Surveys.

[100] Edwin Tsen of Messrs Tan Pang Tsen & Co ("the solicitor") acted for Hiew as the buyer and for Julita as the vendor in the 2005 SPA. In fact, he acted for several parties at the same time. He was the common factor in all the transactions leading to the registration of the title in Hiew's name and the charge in the bank's name. He would have known that the alleged sale by Hamid Dullih to Julita was bereft of any documents and without a sale price. He would have known therefore that there was no proof of Julita's purchase of the lands from Hamid Dullih and that a search would have disclosed the irregularities on the register document of titles for the entries in 2001. He would also have known that Julita, his client did not cultivate the lands and he would have known from the valuation report that the lands were occupied by a plantation company. It cannot be said that the solicitor had no knowledge of any competing interest in the lands as by a letter dated 1 March 2005 and 14 November 2005, he had written to Pintasan Estates/Kwan

brothers, respectively not to prevent Hiew from taking possession of the lands and to give notice to Kwan brothers not to trespass on the lands. The solicitor however did not see it fit to make any inquiries and/or to advise the bank of these concerns for the granting of the loan.

[101] *Vide* a letter dated 12 October 2005, the solicitor notified the bank that there were no restrictions on the titles to create the charge and that the titles were regularly registered in Hiew's name. What was notified by the solicitor to the bank was in fact incorrect as there was a restriction in law against charging the lands without the consent of the Director of Lands and Surveys.

[102] It was Kwan brothers' pleaded case that the bank's agents had knowledge of Kwan brothers' interest but had refused to make inquiries. Despite this pleaded case, the solicitor refused to testify and, supported by the bank, had successfully set aside the subpoena issued against him.

[103] We find that the solicitor as agent of the bank had notice of Kwan brothers' interest and/or that possible fraud or suspicion had been aroused and yet he had failed to make further enquiries. On this ground, with the solicitor's knowledge imputed to the bank, the bank cannot be said to be a *bona fide* chargee and the registration of the charge would be defeasible, unless the solicitor himself is complicit in the fraud. As stated by the Federal Court in *T. Sivam (supra)*, courts would be slow to assist chargee who failed to take ordinary precautions that ought to be undertaken before registering the charge and as such are not entitled to the protection of the court.

[104] Insofar as the State Government is concerned, the High Court dismissed Kwan brothers' counterclaim against it on the ground that the officer implicated in the alleged fraud and/or conspiracy was not cited as a party to the suit. Notwithstanding the failure to name the officer concerned, Iman Ali had been named and identified in the pleadings. Not only was Iman Ali named and identified in the pleadings, he was called by the State Government as its witness, negating any prejudice to the State Government. This is entirely different from the peculiar facts and cause(s) of action pleaded in *Lay Kee Tee* against several State Governments who took immediate actions to strike out the claims under O. 18 r. 19 of the Rules of the High Court 1980. No such action was undertaken by the State Government in the present appeals. In the circumstances, we find that this case is distinguishable from *Lay Kee Tee (supra)*, relied upon by the learned JC and we are of the view that the failure of Kwan brothers to name Iman Ali as a party to the suit is not fatal.

[105] On whether or not there was a decision delivered by Iman Ali on 29 January 2001 on the land enquiry, we find that there were varying accounts given by the witnesses. In concluding that there was no decision on 29 January 2001, His Lordship had accepted the evidence of Kwan brothers. We find no compelling reason to disturb His Lordship's conclusion, as it was not without basis. In particular, the documentary evidence which carries more weight than the oral evidence of witnesses (see *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229), shows that Kwan brothers were informed of the right to appeal within one month from the date of the letter dated 22 March 2001. The date 22 March 2001 was again stated in the letter dated 3 December 2003 written by the Director of Lands and Surveys Kota Kinabalu to the ACLR Kinabatangan and it reads:

> Pejabat ini berpendapat bahawa jika **keputusan tuan yang dibuat pada 22 Mac 2001** tidak dirayu … . (emphasis added)

[106] It was submitted for the defendants in the counterclaim that Kwan brothers failed to adduce any evidence whatsoever that Hamid Dullih had colluded with Tony Vun to induce the natives to breach the alleged sale and purchase agreement with Kwan brothers and that the evidence led by Kwan brothers on fraud, collusion or conspiracy was based on mere suspicion.

[107] It must be appreciated that in cases of fraud or conspiracy, it is very rarely that there will be direct evidence where the fraudsters or conspirators will leave a trail of evidence of their fraudulent acts. It therefore suffices, under the law that surrounding circumstances and the conduct of the parties be considered and for the court to infer fraud or conspiracy from those circumstances and conduct. The Federal Court in *PJTV Denson, (supra)* recognised the importance of surrounding circumstances in establishing the intent to defraud where it is stated that:

> … Therefore, when the surrounding circumstances are capable of establishing a *prima facie* case of intent to defraud, the onus shifts on the appellants to disprove this if it can.
>
> It is our opinion that the transfer was a mere cloak to deprive the judgment creditor of recourse to the property which would otherwise be applicable for its benefit. If this was not a case of deliberate fraud on the judgment creditor, we do not know what is … .

[108] In *Dadourian Group International Inc v. Simms and Others* [2009] 1 Lloyds Rep 601, the English Court of Appeal said at pp. 616, 617:

> 85. We turn to the factual basis of the finding. Here Mr Cakebread advanced a number of propositions which come to this: there was insufficient evidence direct or indirect, from which the judge could properly infer and conclude that Helga knew that her husband had falsely

A represented to DGI that he was only an intermediary. He claimed that the judge was relying almost exclusively on the fact that Helga is Jack's wife and the fact of their joint ownership and control of Ancon and Charlton. …

86. Mr Cakebread reminded us that the judge did not find that Helga had any foreknowledge of the two emails … Indeed, he did not find that she had any knowledge of their contents at any time. This it was said accorded with the fact that there was no evidence that she did. Yet, the trial judge found that she knew what Jack was "saying and doing". …

…

89. We reject Mr Cakebread's categorisation of the trial judge's finding that Helga knew that Jack had falsely represented that he was only an intermediary as mere supposition, conjecture and unjustified assumption. Mr Cakebread appeared to be equating proper inferences with conjecture and assumption. At times he came close to suggesting that fraud can only be established where there is direct evidence. It that were the case, few allegations of fraud would ever come to trial. Fraudsters rarely sit down and reduce their dishonest agreement to writing. Frauds are commonly proved on the basis of inviting the fact-finder to draw proper inferences from facts. … .

[109] In *MGG Pillai v. Vincent Tan Chee Yioun & Other Appeals* [1995] 2 CLJ 912; [1995] 2 MLJ 493, this court said at p. 925 (CLJ); p. 515 (MLJ):

> Conspiracy is a tort that is not always capable of proof by direct evidence. Like so many other facts, an agreement to do an unlawful act or a lawful act by unlawful means may be established by evidence of circumstances from which such an agreement may be inferred.

[110] Similar principles were reiterated in *Cubic Electronic Sdn Bhd (In Liquidation) v. MKC Corporate & Business Advisory Sdn Bhd & Another Appeal* [2016] 3 CLJ 676 where this court stated that in cases of conspiracy, the plaintiff is never required to show the existence of the arrangements between the conspirators in the nature of an express agreement, whether formal or informal. As is often the case, the agreement or combination is to be inferred from the evidence.

[111] The lack of direct evidence should not therefore be the cause to defeat Kwan brothers' counterclaim premised on fraud and conspiracy against the defendants. The law allows us to examine the relationship between the parties and to draw inferences from established facts. In this regard, we consider the following facts and circumstances:

(i) Hamid Dullih who allegedly bought the lands from the natives was employed by Tony Vun as a general employee earning about RM400 a month;

(ii) Julita, a housewife is married to Jimmy Vun, Tony Vun's brother; A

(iii) Hiew had known the Vun brothers for more than 20 years;

(iv) There was no evidence of Julita's financial means to purchase a cultivated oil palm plantation worth RM6.172 million;

(v) There was no evidence of Julita having made any payment to Hamid Dullih for the purchase of the oil palm plantation. In fact, Hamid Dullih confirms that no payment was received from Julita; B

(vi) Throughout this transaction, Hiew did not deal with Julita;

(vii) Jimmy Vun instructed Hiew to pay a deposit of RM500,000 three months before the 2005 SPA was signed, wherein the terms were never followed; C

(viii) Julita admitted that Tony Vun had given her the titles to the land in late 2004/early 2005, but there was no evidence on how Tony Vun obtained the titles from Hamid Dullih; D

(ix) The loan from the bank was purportedly to pay for the purchase price;

(x) The loan was disbursed in November 2005 but the transfers to Hiew were already made earlier in March/April 2005;

(xi) It was Jimmy Vun who instructed that the transfers to Hiew be effected even though more than RM5 million out of the purchase price of RM6.172 million was yet to be paid; E

(xii) Iman Ali testified that he gave an oral decision on 29 January 2001 in the land enquiry that Kwan brothers' caveats be removed; F

(xiii) *Vide* a letter dated 22 March 2001, the Lands and Surveys Department, Kinabatangan states that an appeal may be made within one month from the date of the letter;

(xiv) Kwan brothers' caveats were lifted on 2 February 2001, before the expiry of the appeal period; G

(xv) The back to back transfers from the natives to Hamid Dullih and from Hamid Dullih to Julita was registered on 5 February 2001, also before the expiry of the appeal period;

(xvi) The endorsements lifting the caveats and the back to back transfers were not signed by ACLR all these years; H

(xvii) Julita's name did not appear in a majority of the land office copy of the titles. In memorial sequence No. 5, the transferee's name was left blank;

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(xviii) There were various other discrepancies between the office copy and the owner's copy of the titles, for instance having different memorial number for the same endorsement, with the owner's copy replete with corrections or amendments indicating an attempt to make the two sets of title uniform;

(xix) The transfer to Julita on 5 February 2001 was without the permission of the Director of Lands and Surveys;

(xx) The transfer to Hiew when 90% of the purchase price was unpaid was contrary to the terms of the 2005 SPA, defying business sense and logic;

(xxi) The lands were charged to the bank without the consent of the Director of Lands and Surveys. The consent was only obtained four months later;

(xxii) The sublease to Gabungan by Hiew was for a consideration of RM1 for a period of 90 years; and

(xxiii) To show that the consideration of the sublease had been varied to RM10,000 per month, a deed of variation was prepared belatedly after Hiew and Gabungan had closed their case.

[112] The relationship between Hamid Dullih, Tony Vun, Jimmy Vun, Julita and Hiew, taken together with the established facts adverted to above, in our view, reasonably and properly support the inference that the transactions between Hamid Dullih and the natives and between Hamid Dullih and Julita were all but sham transactions and that Hamid Dullih and/or Hamid Dullih's name was being used by Tony Vun. We are fortified in our finding by the Surat Keterangan Dan Akuan dated 3 May 1999 signed by among others Nur Sakandal which states *inter alia* that "TONY VUN memakai nama ABDUL HAMID DULLIH sebagai pembeli tanah PT No. 84092242-84092287".

[113] Looking at the established facts and circumstances, we therefore find that there was sufficient evidence before the court to show that Tony Vun, Julita, Hiew and Gabungan had acted dishonestly such as to deprive Kwan brothers of the lands. And having regard to the sequence of events and the irregularities in the transaction and the whole circumstances of the case, we find, on the balance of probabilities that Kwan brothers had established their pleaded case against the defendants in the counterclaim.

[114] On Julita's counterclaim, although no reason was given by the learned JC on why he had dismissed the counterclaim, we find no reason to depart from His Lordship's decision that Julita's counterclaim against Kwan brothers could not stand. Julita was privy to the sham transaction and undoubtedly the lands were cultivated by Kwan brothers. Julita would be unjustly enriched if her claim for profits from the lands which were not developed through her efforts, is allowed. The learned JC was not plainly wrong in dismissing Julita's counterclaim.

Conclusion

[115] In light of the above findings, we unanimously allow Appeal No. 742 ie, Kwan brothers' appeal against the dismissal of their counterclaim against the bank and the State Government with costs. We are however of the view that Kwan brothers are not entitled to the relief sought that the Registrar be directed to register Kwan brothers' names as the registered owners of the lands, given that Kwan brothers had not paid the purchase price in full.

[116] For clarity, judgment is entered for Kwan brothers and Kwantas in terms of the prayers in para. 69 of the re-re-amended defence and re-re-amended counterclaim dated 19 July 2011 (at p. 266 of the core bundle), except for prayer (vi) and prayers (xB–xii).

[117] We dismiss Appeals No. 3134 and 3135 ie, the appeals by Tony Vun, Julita, Hiew and Gabungan with costs.